

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 25, 2006 Session

STATE OF TENNESSEE v. CHRISTOPHER SHANE HARRELL

**Direct Appeal from the Criminal Court for Knox County
No. 78640 Mary Beth Leibowitz, Judge**

No. E2005-01531-CCA-R3-CD - Filed February 26, 2007

The Defendant, Christopher Shane Harrell, was convicted of first degree murder, attempted first degree murder, especially aggravated kidnapping, especially aggravated robbery, and evading arrest. The trial court sentenced the Defendant to life without parole plus twenty years of incarceration to be served consecutively. On appeal, the Defendant contends that: (1) the trial court erred when it instructed the jury; (2) the trial court erred when it refused his request to play his entire pretrial statement to the jury; (3) the evidence was insufficient to support his convictions; (4) the trial court erred when it admitted hearsay statements into evidence; and (5) the trial court erred when it overruled the Defendant's objection to the State's reference to him as a "coward" and a "murderous coward" in its closing argument. After thoroughly reviewing the record and the applicable authorities, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID G. HAYES and J.C. McLIN, JJ., joined.

Mark Stephens, John Halstead, and Christy Murray, Knoxville, Tennessee, for the Appellant Christopher Shane Harrell.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Randall E. Nichols, Jr., District Attorney General; Jo Helm, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

This case arises from the Defendant's conviction of the first degree murder of Lee R. Moody, attempted first degree murder of Rosemary R. Moody, especially aggravated kidnapping of Tricia

M. Moody, especially aggravated robbery, and evading arrest. The following evidence was presented at the Defendant's trial: Tricia Moody testified that she attended the University of Tennessee in Knoxville. She said that she began dating the Defendant in the Spring of 2000, and she ended their relationship in 2003. Tricia Moody began receiving emails from Weston Able, a friend of both her and the Defendant. She recalled receiving an email from Weston asking her to meet him at the Mellow Mushroom. She went to the Mellow Mushroom but saw the Defendant instead of Able. As soon as she saw the Defendant, she walked back to her truck, and the Defendant followed her. The Defendant told her that he wanted to talk to her, and she had a few drinks with the Defendant. Tricia Moody got drunk, the Defendant asked her "to go smoke a joint," and she agreed. They went to the Defendant's home, Tricia Moody started to cry, the Defendant tried to take off her clothes, and she left.

Tricia Moody also described how the Defendant appeared uninvited at an apartment where Tricia Moody and her friends had gathered before going to hear a band. She believed that she had sent an email to Able that described her plans for the evening, and she was shocked when the Defendant arrived at her friend's apartment. She left the apartment and went with her friends to a concert at Blue Cats. She saw the Defendant at the concert, he asked to speak with her, and she refused. She turned away from the Defendant, and he kicked her rear end and called her a "b*tch."

Tricia Moody testified that on November 16, 2003, she went with her parents to tailgate, then her parents went to a football game while she returned home. Tricia Moody said that, when she returned home from church around 10:30 a.m. the next morning, she heard a noise, went upstairs, walked into her room, and saw the Defendant standing there. She screamed, and the Defendant screamed back at her in a mocking tone. She recalled the Defendant wore hiking shoes, scuba-diving gloves, a toboggan, and a baseball cap. The Defendant hit her in the head with a slapjack that she had previously seen him use. Tricia Moody and the Defendant fell to the ground, and Tricia Moody screamed, "Somebody help me." The Defendant pulled out a gun and pointed it between her eyes. The Defendant told Tricia Moody that he would kill her unless she was quiet. He also told her, "Look how far I've come," and "I've got this all planned out." He pulled some duct tape out of a backpack. The Defendant put Tricia Moody in her bathroom closet and wrapped her body in tape. He placed "shooter muffs" on Tricia Moody's head and wrapped tape around her face and head. The Defendant tried to place a gag inside Tricia Moody's mouth, but she spit out the gag.

Tricia Moody explained that she could see through a small slit when she looked down. The Defendant left her in the closet, then he returned and asked Tricia Moody if she was going to place a restraining order against him, and Tricia Moody said, "yeah." The Defendant again left the closet, returned, cut the tape away from Tricia Moody's legs, and walked her to the attic. Tricia Moody estimated that she was in the attic for one hour. She recalled that the Defendant said that he had a plane and had tickets for them to go to Baja, Mexico. He said that he planned to restrain Tricia Moody's parents, and she asked if he intended to kill them. The Defendant replied that he only planned to restrain them. He informed Tricia Moody that she would hear some gun shots and told her not to scream.

Tricia Moody recalled hearing the garage door open and her parents walk into the kitchen. Then she heard four gun shots and her dad say, "What the hell?" Tricia Moody said that she was in shock, zoning in and out, praying to God, and wondering what was happening. She recalled that the fire alarm sounded. She heard the garage door open again and tires squeal. Tricia Moody stated that she had pulled her truck into the garage when she returned home from church. Next, Tricia Moody heard ambulance sirens and police cars. She hoped that these vehicles had come to save her. A deputy sheriff and emergency personnel rescued her from the attic. Tricia Moody explained that all she could see were feet and black pants because she was mostly covered with duct tape.

Rosemary Moody, Tricia Moody's mother, testified that, on November 16, 2003, she and her husband left their home at 11:30 a.m. When they returned around midnight, she noticed that their home alarm had sounded, and she thought her daughter had set off the alarm. The next morning, after Tricia Moody left for church, she went to church with Lee Moody, her husband, and they returned to their home around 12:30 p.m. Lee Moody entered their home and went upstairs. Rosemary Moody walked into her home, put some rain clothes on the steps, and began to walk toward the kitchen. She saw the Defendant, and he startled her because she did not expect to see him in her home, and she said "Hi," or "Shane."

Rosemary Moody testified that the Defendant lifted a gun, walked toward her, and fired his gun. He fired four shots, four bullets hit her, and she slid down beside the refrigerator onto the floor. The gunshots emitted smoke, which caused the fire alarm to sound. Rosemary Moody screamed her husband's name, but she did not know if he heard her scream. She testified that the Defendant reloaded his gun and ran up the front steps. Rosemary Moody stated she could not hear gunshots because the fire alarm made so much noise. The house became quiet and she realized that she was still breathing. She grabbed her cell phone and ran to a home two houses away, hid on the deck, dialed 9-1-1, and then the paramedics and police came to rescue her. Rosemary Moody testified that, when the Defendant realized that she had moved, he took Tricia Moody's truck and left her home. Rosemary Moody then watched the Defendant stop in Tricia Moody's truck and stare at her with his gun in his hand. She testified that this truck belonged to Tricia Moody, even though at the time of this incident it was titled in her and her son's names.

Terry Lee, a Lieutenant with the Knox County Sheriff's Office, identified a slapjack and explained that this instrument is used in the same manner as a police baton. He believed that someone found the slapjack inside the Defendant's backpack. He also identified a Glock .40 caliber automatic weapon and a magazine clip that could hold ten rounds found inside the truck that the Defendant had used to escape. A video of the police chasing this truck and then apprehending the Defendant was played.

On cross-examination, Lieutenant Lee testified that the following items were found inside the Defendant's truck on the day of the crime: a Busch beer can, a bottle of Kelser, a bottle of Jack Daniels, a Wal-Mart bag with an empty Miller High Life can inside, and another open Miller High Life can. Lieutenant Lee also testified that a Seagram's Seven Crown bottle was found on a kitchen island stove at the victim's home.

Dr. Sandra K. Elkins testified as an expert in the field of forensic pathology. She said that she examined Lee Moody, one of the victims. She discussed two gunshot wounds that the victim received, one wound was located on the front right side of the victim's chest and the other wound, which was fatal, was located on the top of the victim's head. Dr. Elkins testified that Lee Moody could only survive for a few seconds or minutes after receiving the gunshot wound to the head.

On cross-examination, Dr. Elkins testified that she did not have any firsthand knowledge about Lee Moody's shooting. She testified that she performed an autopsy on the Defendant's father in 1995 and determined that his manner of death was unknown. She also testified that her office performed an autopsy on the Defendant's sister in 1994 and determined that she died of cardiopulmonary arrest. Dr. Elkins also testified about the death of the Defendant's stepsister, and said that she also died of cardiopulmonary arrest.

The Defendant's mother testified the Defendant's younger sister was born with three C chromosomes, causing her to have a lower IQ, various health problems, and grand mal seizures on a regular basis. The Defendant's sister also suffered from mental illness and had poor communication skills. The Defendant had a close relationship his sister, and he acted as her translator until she died in 1994. The Defendant's mother. also described other members of the Defendant's family. His stepsister died of a respiratory disease and his stepbrother was diagnosed as a sociopath. She explained that the Defendant had a close relationship with her husband and that her husband was shot in his bed in 1995. She said that, six months after her husband's death, the Defendant began to perform poorly in school and to associate with bad people.

The Defendant discussed his relationship with his family members and explained that he was very upset when his younger sister and stepfather died. After the Defendant's stepfather died, he started to drink, smoke marijuana, and take pills. The Defendant saw a psychiatrist but said that the therapy did not help him. The Defendant described how he met Tricia Moody in the summer of 2000, how they dated for three years, how Tricia Moody ended their relationship in the spring of 2003, and how the Defendant struggled with losing Tricia Moody. He testified that in September of 2003, he took a weapon from his friend's home and decided to go to the mountains to kill himself but was unable execute a suicide attempt.

The Defendant testified that he emailed Tricia Moody from Able's email account and, while pretending to be Able, he asked her to meet him at the Mellow Mushroom. The Defendant met Tricia Moody there, they talked for a little while, they both got drunk, and then they decided to leave. They went to the Defendant's house and talked in his driveway. Tricia Moody went inside to use the restroom, and then the Defendant went inside. The two sat down on the couch and talked, and Tricia Moody became emotional and began to cry. The Defendant told Tricia Moody that he wanted to kiss her and thought that she did not mind if he kissed her, and then they kissed. He said that Tricia Moody received a phone call and decided to leave his residence.

The Defendant testified that he called Tricia Moody a few times during the following week and that she told him about her plans to hear a band play at Blue Cats. The Defendant determined

that Tricia Moody would probably go visit Ryan, their mutual friend, before the show, and he went to Ryan's house. When he arrived at Ryan's home, Tricia Moody went into a different room, and, when the Defendant went into that room, Tricia Moody again went to another room. At Blue Cats, the Defendant asked Tricia Moody why she was avoiding him. He was angry because Tricia Moody was friendly with him a few days ago and suddenly changed her behavior. The Defendant said that he called Tricia Moody a "b*tch" and kicked her in the butt. The Defendant left Blue Cats. During the next three days, he drank constantly and slept little. He emailed Tricia Moody and called her on the phone, but she did not respond.

The Defendant said that, on Saturday afternoon, he drank about a half pint of whiskey, purchased some more whiskey and a six pack of beer, and then went to Tricia Moody's house. The Defendant did not pull into Tricia Moody's driveway because he knew that she would leave if she saw his car. He parked away from her house and walked to her residence. He carried a backpack with a gun inside. The Defendant explained that he had never fired the gun or purchased bullets for the gun, and the gun already had bullets inside. The Defendant testified that he knew that the gun was loaded because, when he looked at the back of the clip, he could see a bullet in the ninth slot. The Defendant said that he took his father's slapjack to Tricia Moody's home in case he needed to defend himself against Tricia Moody's father. After he arrived at Tricia Moody's home, he noticed that a back window was cracked three to four inches. The Defendant entered the home through the window, went to the liquor cabinet, had a few drinks, and popped some pills from a bottle on the table.

The Defendant testified that the house alarm sounded, and he exited Tricia Moody's residence and left the neighborhood but could still hear the alarm. He went back to Tricia Moody's home and entered through the front door. Someone came in the front door, and the Defendant ran to the attic. Someone shined a light through the attic and then shut the door. The Defendant testified that he stayed in the attic for about sixteen hours but that he did not sleep. The Defendant testified that he left the attic, put a toboggan over his head so that no one would recognize him, and pulled the slapjack out of his backpack. He heard someone downstairs and assumed that the person was Tricia Moody. He thought about his entire life and became overwhelmed with emotion. The Defendant testified that he could not recall what happened after he left the attic. He said that "everything just became a blur" and that he could only remember "bits and pieces." He testified that he did not go to Tricia Moody's home with the intent to kidnap Tricia Moody, to kill Rosemary Moody, or to kill Lee Moody.

During cross-examination, the Defendant was asked about prior inconsistent statements that the Defendant gave to a police officer on the day of the crime. The Defendant explained that he was very confused about everything that had happened when he spoke to the police officer. He noted that he had just dealt with a traumatic situation and that he felt intoxicated when the police officer interrogated him. The Defendant testified that he could not confirm or dispute any of the testimony that State witnesses had provided because he could not recall the events that occurred on the day of the crime. He explained that he "came out of the haze" when the police were chasing him after he had left Tricia Moody's home. The Defendant testified that he grabbed car keys from the kitchen

table, hit a button, the vehicle's lights flashed, and the Defendant used this vehicle as his get away car.

Based upon this evidence, the jury convicted the Defendant of first degree murder, attempted first degree murder, especially aggravated kidnapping, especially aggravated robbery, and evading arrest.

II. Analysis

On appeal, the Defendant contends that: (1) the trial court erred when it instructed the jury; (2) the trial court erred when it refused his request to play his entire pretrial statement to the jury; (3) the evidence was insufficient to support his convictions; (4) the trial court erred when it admitted hearsay statements into evidence; and (5) the trial court erred when it overruled the Defendant's objection to the State's reference to him as a "coward" and a "murderous coward" in its closing argument.

A. Jury Instructions

The Defendant contends that the trial court erred when it instructed the jury. Specifically, he argues that the trial court erred when it instructed the jury that amnesia "is in and of itself not a defense to a criminal charge" and that the felony murder occurred during the perpetration of an aggravated burglary, even though the indictment charged the Defendant with felony murder that occurred during the perpetration of a burglary. The State contends that the trial court properly instructed the jury.

1. Amnesia Instruction

The Defendant contends that the trial court erred when it instructed the jury that "amnesia in and of itself is no defense to a criminal charge." Specifically, he argues that, due to this instruction, a rational juror would most likely conclude that the evidence on the Defendant's mental state should not be considered. The Defendant contends that he could not recall the events of his crime on account of: (1) his highly distraught emotional state due to his inability to accept that Tricia Moody had ended their relationship; (2) his repressed emotions and memories resulting from the death of his family members; (3) the trauma of the crime itself; and (4) his ingestion of alcohol. The Defendant contends that, due to the trial court's instruction, the jury could not use this information to determine that he had a lesser degree of culpability for the crimes committed. He argues that, therefore, this jury instruction violated his right to a trial by jury and his right to present a defense. The State contends that the Defendant is not entitled to relief on this issue.

A trial court has the duty, in criminal cases, to fully instruct the jury on the general principles of law relevant to the issues raised by the evidence. See State v. Burns, 6 S.W.3d 453, 464 (Tenn. 1999); State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986); State v. Elder, 982 S.W.2d 871, 876 (Tenn. Crim. App. 1998). Nothing short of a "clear and distinct exposition of the law" satisfies a defendant's constitutional right to trial by jury. State v. Phipps, 883 S.W.2d 138, 150 (Tenn. Crim.

App. 1994). In other words, the court must instruct the jury on those principles closely and openly connected with the facts before the court, which are necessary for the jury's understanding of the case. Elder, 982 S.W.2d at 876. Because questions of the propriety of jury instructions are mixed questions of law and fact, our standard of review here is de novo, with no presumption of correctness. State v. Rush, 50 S.W.3d 424, 427 (Tenn. 2001); State v. Smiley, 38 S.W.3d 521, 524 (Tenn. 2001).

Generally, "a defendant has a constitutional right to a correct and complete charge of the law." State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990), *superseded by statute on other grounds as stated in* State v. Reid, 91 S.W.3d 247, 314 (Tenn. 2002). When reviewing jury instructions on appeal to determine whether they are erroneous, this Court should "review the charge in its entirety and read it as a whole." State v. Hodges, 944 S.W.2d 346, 352 (Tenn. 1997). The Tennessee Supreme Court, relying on the words of the United States Supreme Court, has noted that:

[J]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Id. (quoting Boyde v. California, 494 U.S. 370, 380-81 (1990)). A jury instruction is considered "prejudicially erroneous," Hodges, 944 S.W.2d at 352, only "if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law." Id. Even if a trial court errs when instructing the jury, such instructional error may be found harmless. State v. Williams, 977 S.W.2d 101, 104 (Tenn. 1998).

Our supreme court examined a jury instruction that provided that the defendant's inability to remember the details of the alleged crime was "in itself no defense to this charge" in State v. Brown, 836 S.W.2d 530, 553 (Tenn. 1992), *superseded by statute on other grounds as stated in* State v. Robin Davis, No.W2000-03137-CCA-R3-CD, 2002 WL 1483221, at *8 (Tenn. Crim. App., at Jackson, Mar. 25, 2002), *perm. app. denied* (Tenn. Oct. 7, 2002). The Brown decision determined that the defendant's statements raised questions about his memory surrounding his son's death and that "[t]here was no error in giving an instruction necessitated by this evidence." Id. We conclude that, in the case under submission, the trial court did not err when it instructed the jury that "amnesia in and of itself is no defense to a criminal charge." This instruction did not mislead the jury about the applicable law because the instruction does not suggest that the jury should totally disregard the Defendant's inability to remember his actions during the commission of the crimes charged against him.

The Defendant argues that the Brown rationale does not apply to the instant case because, in Brown, the Tennessee Supreme Court determined that the record did not contain sufficient evidence to sustain the defendant's conviction for first degree premeditated murder. However, whether evidence is sufficient to support a defendant's convictions and whether a trial court properly

instructed a jury are two separate and unrelated issues. Also, in the instant case, the record provides substantial evidence to support the Defendant's first degree murder conviction.

Furthermore, we note that the jury instruction at issue in the instant case did not preclude the jury from considering the Defendant's mental state. The trial court instructed the jury that:

If you find that the defendant was intoxicated to the extent that he could not have possessed the required culpable mental state, then he cannot be guilty of the offense charged.

If you are not satisfied beyond a reasonable doubt that the Defendant possessed the culpable mental state, then you must find him not guilty.

This Court has previously determined that “[j]ury instructions must . . . be reviewed in the context of the overall charge rather than in isolation.” Rickman v. State, 972 S.W.2d 687, 695 n.12 (Tenn. Crim. App. 1997). It is apparent that the trial court did not encourage the jury to disregard the evidence pertaining to the Defendant's mental state or to ignore his claims that he did not intend to kill the victim. Therefore, this jury instruction did not deprive the Defendant of his right to due process, his right to present a defense, his right to a trial by jury, and his right to testify. However, even if the trial court erred by giving the instruction on amnesia, such error was clearly harmless beyond a reasonable doubt due to the overwhelming evidence presented that the Defendant premeditated his crimes. The Defendant is not entitled to relief on this issue.

2. Felony Murder Instruction

The Defendant argues that the trial court erred when it instructed the jury that the felony murder was committed during the perpetration of an aggravated burglary when the indictment alleged that the felony murder occurred during a burglary. The Defendant asserts that, due to the change in the indictment, the State could prove that the Defendant killed the victim when he entered the home as opposed to when he stole the Toyota Tacoma truck. The State contends that the variance between the indictment and the jury instruction did not affect the Defendant's substantial rights.

The indictment at issue contains the following language: [The Defendant], heretofore, to-wit: On or about the 16th day of November, 2003, in the State and County aforesaid, did unlawfully kill Lee R. Moody during the perpetration of Burglary, in violation of T.C.A. 39-13-202,” During trial, the State requested that the court charge the jury that the felony murder was committed during the perpetration of an aggravated burglary as demonstrated by the proof. The Defendant objected and the trial court overruled the objection.

Both the Federal and Tennessee Constitutions guarantee the criminally accused knowledge of the “nature and cause of the accusation.” U.S. Const. Amend. VI; see also Tenn. Const. art. I, § 9. In order to comply with these constitutional guidelines, an indictment or presentment must

provide notice of the offense charged, adequate grounds upon which a proper judgment may be entered, and suitable protection against double jeopardy. Tenn. Code Ann. § 40-13-202 (2003); State v. Byrd, 820 S.W.2d 739, 740-41 (Tenn. 1991). The Tennessee Supreme Court has stated:

[A]n indictment is sufficient to satisfy the constitutional guarantees of notice to the accused if the indictment contains allegations that: (1) enable the accused to know the accusation to which answer is required; (2) furnish the trial court an adequate basis for entry of a proper judgment; and (3) protect the accused from a subsequent prosecution for the same offense.

State v. Hammonds, 30 S.W.3d 294, 299 (Tenn. 2000) (citations omitted).

In Hammonds, the Court announced its “relaxation of common law pleading requirements and . . . reluctance to elevate form over substance when evaluating the sufficiency of indictments” and stated “indictments which achieve the overriding purpose of notice to the accused will be considered sufficient to satisfy both constitutional and statutory requirements.” Id. At 300. “A variance between an indictment or a subsequent bill of particulars and the evidence presented at trial is not fatal unless it is both material and prejudicial.” State v. Shropshire, 45 S.W.3d 64, 71 (Tenn. Crim. App. 2000) (citing State v. Moss, 662 S.W.2d 590, 592 (Tenn. 1984)). A variance is not material when substantial correspondence exists between the proof and the indictment. Shropshire, 45 S.W.3d at 71. When the indictment and the proof substantially correspond, the Defendant is not misled or surprised at trial, and there is protection against a second prosecution for the same offense, the variance is not considered material. Moss, 662 S.W.2d at 592. It is not reversible error when a defendant is sufficiently aware of the charge and is able to adequately prepare for trial. Id. In State v. Reid, our supreme court determined that the trial court properly allowed the State to amend an indictment to change the predicate felony underlying two counts of felony murder from “especially aggravated robbery” to “robbery.” Reid, 164 S.W.3d 286 at 312. The Reid Court explained that “no new or different offenses were alleged; to the contrary, the amended indictment, like the original indictment, charged two counts of felony murder” Id.

Similarly, in the case under submission, both charges against the Defendant, and the original indictment, charged felony murder. Furthermore, the variance did not affect the Defendant’s substantial rights. The indictment and the proof substantially corresponded, and the indictment provided the Defendant with sufficient notice and protection against double jeopardy. The transcript reflects that the Defendant was adequately prepared for trial, and he has failed to establish that he was prejudiced by the change in the indictment. The Defendant makes no allegation that he was in any way surprised by the proof at trial. The Defendant’s primary defense was based upon his lack of intent, not a defense hinging upon whether he killed the victim during the perpetration of a felony. Additionally, if there was any error in the trial court’s instruction, it was clearly harmless. The Defendant’s felony murder conviction was merged with his conviction for premeditated murder. The Defendant is not entitled to relief on this issue.

B. Pretrial Statement

The Defendant contends that the trial court erred when it refused the Defendant's request to play his entire pretrial statement before the jury. He argues that the tape of his pretrial statement puts the differences between his statement and his trial testimony into context. The State contends that the trial court did not err when it refused to admit the Defendant's entire pretrial statement into evidence.

The record reflects that the Defendant was cross-examined about some differences between his pretrial statement to the police and his trial testimony. The Defendant testified that he never used the weapon that he had with him on the day of the crime. When asked about a statement that he provided to a police officer on the day of the crime asserting that he had used the weapon recently while target shooting, the Defendant explained that he had used other weapons for target shooting. When asked why he told the police officer that he recently used a lot of ammunition for this weapon, the Defendant explained that he must have misunderstood the police officer's question. The State also cross-examined the Defendant about his testimony that the gun only had nine out of ten possible bullets in the clip and asserted that the Defendant told a police officer that the gun was fully loaded. The Defendant explained that he considered the gun to be fully loaded because the gun had nine out of ten bullets inside. The State then cross-examined the Defendant about his testimony that he could not recall taking the gun out of his backpack by confronting the Defendant with his statement to the police officer asserting that he recalled feeling the gun in his pocket when it was pressing into his leg. The Defendant then testified that he recalled the gun jabbing his leg. The Defendant explained that he was trying to be truthful when he spoke to the police officer, but he was under a great deal of stress and was still very traumatized.

Rule 106 of the Tennessee Rules of Evidence provides as follows: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness be considered contemporaneously with it." This rule "allows the trier of fact to 'assess related information at the same time rather than piecemeal.'" State v. Keough, 18 S.W.3d 175, 182 (Tenn. 2000) (citations omitted). Evidence offered pursuant to Rule 106 "must be relevant to issues in the case . . . and . . . must explain or qualify already-admitted evidence." State v. Amos L. Brown, No. E2000-00285-CCA-R3-CD, 2002 WL 170747, at *13 (Tenn. Crim. App., at Knoxville, Feb. 4, 2002) (citations omitted), *perm. app. denied* (Tenn. Sept. 23, 2002). To determine whether the evidence explains or qualifies already admitted evidence, courts should consider whether the evidence "(1) explains the admitted proof; (2) places the admitted proof in context; (3) avoids misleading the trier of fact; or (4) ensures a fair and impartial understanding of the proof." Id. (citing United States v. Jackson, 180 F.3d 55, 73 (2d Cir. 1999); Glover, 101 F.3d at 1190; United States v. Sources, 736 F.2d 87, 91 (3d Cir. 1984)). A trial court's determination concerning the admission of evidence pursuant to Rule 106 will be reversed on appeal only when there has been an abuse of discretion. Id.

In the case under submission, the trial court did not abuse its discretion when it declined to enter the entire pretrial statement into evidence. Consideration of the Defendant's entire pretrial statement was unnecessary to place the admitted proof into context or to explain the admitted proof. When asserting that the jury should have heard his entire pretrial statement, the Defendant refers to

portions of the statement in which he tells the police officer that he was confused at the time of the offenses and that he could not remember any significant details surrounding the offenses. However, these broad assertions do not explain or relate to the specific discrepancies between the Defendant's trial testimony and his pretrial statement. The jury did not need to hear the Defendant's entire statement in order to ensure a fair and impartial understanding of the proof. The Defendant had previously testified that he could not remember exactly what occurred when he committed the crimes, and the Defendant's entire pretrial statement merely reiterated these assertions. Therefore, the record does not reflect that the jury was misled by only hearing certain portions of the Defendant's pretrial statement. The Defendant is not entitled to relief on this issue.

C. Sufficiency of the Evidence

The Defendant contends that the evidence was not sufficient to sustain his conviction for especially aggravated robbery because the indictment alleged that the Toyota Tacoma truck was taken from Rosemary Moody who was neither the owner nor the possessor of the truck. The Defendant does not dispute that he took the vehicle or that Rosemary Moody suffered serious bodily injury. The State contends that the evidence is sufficient to support the Defendant's conviction.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Tenn. R. App. P. 13(e)*; *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). "[B]efore an accused can be convicted of a criminal offense based on circumstantial evidence alone, the facts and circumstances 'must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant . . .'" *State v. Raines*, 882 S.W.2d 376, 380 (Tenn. Crim. App. 1994) (quoting *State v. Crawford*, 470 S.W.2d 610, 612 (Tenn. 1971)). "In other words, '[a] web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt.'" *Id.* (quoting *Crawford*, 470 S.W.2d at 613).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). Questions concerning the credibility of the witnesses, the weight and value of the evidence, and all factual issues raised by the evidence are resolved by the trier of fact. *Liakas*, 286 S.W.2d at 859. "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). Our supreme court stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus, the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing Carroll v. State, 370 S.W.2d 523, 527 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. Goodwin, 143 S.W.3d at 775 (citing State v. Smith, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. Id.; see State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000).

Especially aggravated robbery is robbery accomplished by the use of a deadly weapon and involves serious bodily injury to the victim. Tenn. Code Ann. § 39-13-403(a) (2003). Robbery is defined as “the intentional or knowing theft of property from the person of another by violence or putting the person in fear.” Tenn. Code Ann. § 39-13-401(a) (2003). A robbery may be actual or constructive. State v. Edwards, 868 S.W.2d 682, 700 (Tenn. Crim. App. 1993). “It is actual when the taking is immediately from the person; and constructive when in the possession or in the presence of the party robbed.” Id. (citations omitted). A victim may constructively possess property although the property is in another room. Id. “In determining whether a defendant has been in possession of drugs or stolen property, this court has held that ‘possession means control.’” State v. Rafael A. Bush, No. M2002-02390-CCA-R3-CD, 2004 WL 794755, at *7 (Tenn. Crim. App., at Nashville, Apr. 14, 2004), *no. Tenn. R. App. P. 11 application filed*. The offense of robbery “does not depend upon the victim having a right of possession or title to the property.” State v. John Wayne Singleton, 1987 WL 16381, at * 2 (Tenn. Crim. App., at Jackson, Sept. 2, 1987), *perm. app. denied* (Nov. 16, 1987) (citing Elliot v. State, 454 S.W.2d 187, 188 (1970)). Pursuant to Tennessee Code Annotated section 39-11-106(a)(26) (2003):

‘Owner’ means a person, other than the defendant, who has possession of or any interest other than a mortgage, deed of trust or security interest in property, even though that possession or interest is unlawful and without whose consent the defendant has no authority to exert control over the property.

In the case under submission, the evidence is sufficient to support the Defendant’s conviction. Rosemary Moody testified that the truck’s title was in her name and her son’s name at the time of this incident. The record also reflects that Rosemary Moody had constructive possession of the truck when the Defendant stole the vehicle. The Defendant took the truck from Rosemary Moody’s garage, and he took the keys to the vehicle from the table in Rosemary Moody’s kitchen. Although Rosemary Moody was not present in the garage, she had control over the area from which the Defendant took the vehicle. Even if Rosemary Moody was not the truck’s owner, she obviously

had a greater right to its possession than the Defendant, and, therefore, the Defendant's confiscation of the truck constituted a taking. See Bush, No. M2002-02390-CCA-R3-CD, 2004 WL 794755 at *7. When viewing the evidence in a light most favorable to the State, a jury could reasonably conclude that Rosemary Moody had title to, and constructive possession over, the truck, and the Defendant committed the offense of especially aggravated robbery. Therefore, the Defendant is not entitled to relief on this issue.

D. Hearsay

The Defendant contends that the trial court erred when it admitted a hearsay statement included within the medical examiner's report into evidence. The State contends that the trial court did not err when it admitted the entire medical report into evidence. The medical examiner's report contains the following statement: "Reportedly shot ambush style by daughter's estranged boyfriend. Decedent shot as he was returning from church -- dead at scene." The Defendant objected at trial, and the trial court stated: "Obviously, if [it's] offered, it can't be offered for the truth of the matter and inserted in the record. But it can be offered, I think, for the information that Dr. Elkins had as part of her findings"

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). As a general rule, hearsay is not admissible at trial except as provided by the rules or otherwise by law. Tenn. R. Evid. 802. "The determination of whether a statement is hearsay and whether it is admissible through an exception to the hearsay rule is left to the sound discretion of the trial court." State v. Thomas, 158 S.W.3d 361, 400 (Tenn. 2005). As such, an appellate court will not reverse a trial court's ruling regarding the admission or exclusion of hearsay evidence absent a clear showing that it abused its discretion.

In the case under submission, we conclude that the trial court did not abuse its discretion when it allowed the statement in the medical examiner's report into evidence. First, we note that the statement was not offered to establish the truth of the matter asserted but was instead used to show the information that Dr. Elkins had while conducting her autopsy report. Second, we conclude that the medical examiner's report was admissible under the "public records" exception. Tennessee Rule of Evidence 803(8) provides that:

Public Records and Reports. Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness, records, reports, statements, or data compilations in any form of public offices or agencies setting forth the activities of the office or agency or matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other law enforcement personnel.

This rule allows for the admission of records of public officials acting under an official duty to report accurately. Pursuant to statute, county medical examiners have a duty to immediately investigate the circumstances of an individual's death, record the findings of that investigation, and forward a

copy of the autopsy report to the Chief Medical Examiner of the State. See Tenn. Code Ann. § 38-7-109 (2003). Therefore, the medical examiner's report is a public record for purposes of admission under 803(8). See State v. Davis, 141 S.W.3d 600, 630 (Tenn. 2004).

E. Closing Arguments

The Defendant contends that the trial court erred when it overruled the Defendant's objection to the State's reference to the Defendant as a "coward" and a "murderous coward." The State contends that any error regarding these remarks constitutes harmless error. During rebuttal summation, the prosecutor made the following statement: "And I don't know why he can't say it. I suspect because he's a coward and a coward that lays in wait. A murderous coward." The Defendant objected to this statement and the trial court overruled the objection, stating, "I think he can make his argument." The trial court later provided the jury with the following instruction, "The statements, arguments, and remarks of the attorneys are intended to help you in understanding and applying the law, but they are not evidence. You should disregard any statements made that you believe are not supported by the evidence."

The Tennessee Supreme Court "has long recognized that closing arguments are a valuable privilege that should not be unduly restricted." Terry v. State, 46 S.W.3d 147, 156 (Tenn. 2001) (citing State v. Sutton, 562 S.W.2d 820, 823 (Tenn. 1978)). "Consequently, attorneys are given greater leeway in arguing their positions before the jury, and the trial court has significant discretion in controlling these arguments, to be reversed only upon a showing of an abuse of that discretion." Terry, 46 S.W.3d at 156 (citing Sutton, 562 S.W.2d at 823). This Court has explained that "arguments must be temperate, based upon the evidence introduced at trial, relevant to the issues being tried, and not otherwise improper under the facts or law." See State v. Goltz, 111 S.W.3d 1, 5 (Tenn. Crim. App. 2003) (citing Coker v. State, 911 S.W.2d 357, 368 (Tenn. Crim. App. 1995) *superseded by Rule on other grounds as stated in* State v. West, 19 S.W.3d 753, 755 (Tenn. 2000)).

When an appellate court finds an argument to be improper, "the established test for determining whether there is reversible error is whether the conduct was so improper or the argument so inflammatory that it affected the verdict to the Appellant's detriment." Goltz, 111 S.W.3d at 5 (citing Harrington v. State, 385 S.W.2d 758, 759 (1965)). In measuring the prejudicial impact of an improper argument, this Court should consider the following factors: "(1) the facts and circumstances of the case; (2) any curative measures undertaken by the court and the prosecutor; (3) the intent of the prosecution; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength or weakness of the case." Goltz, 111 S.W.3d at 5-6 (citing Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976)).

In the case under submission, we conclude that the State's reference to the Defendant as a "murderous coward" did not affect the verdict and prejudice the Defendant. The State presented a strong case against the Defendant and much of the evidence was undisputed. Furthermore, the trial court instructed the jury to disregard any of the attorney's statements not supported by the evidence. A jury is presumed to have followed the law as instructed. State v. Harris, 839 S.W.2d 54, 72 (Tenn. 1992). The Defendant has failed to establish that the alleged prosecutorial error made during the

closing argument affected the jury's verdict. Therefore, the Defendant is not entitled to relief on this issue.

III. Conclusion

In accordance with the aforementioned reasoning and authorities, we conclude that there exists no reversible error in the judgment of the trial court. Accordingly, we affirm the findings of the trial court.

ROBERT W. WEDEMEYER, JUDGE